

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOSE ANGEL LOPEZ, ET AL.,)	CASE NO: 2:11-CV-00353
)	
Plaintiffs,)	CIVIL
)	
vs.)	Corpus Christi, Texas
)	
ALLIS-CHALMERS ENERGY, INC.,)	Friday, April 13, 2012
)	
<u>Defendant.</u>)	(2:31 p.m. to 3:22 p.m.)

MOTIONS HEARING

BEFORE THE HONORABLE NELVA GONZALES RAMOS,
UNITED STATES DISTRICT JUDGE

Appearances:	See next page
Court Recorder:	Genay Rogan
Clerk:	Brandy Cortez
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APPEARANCES FOR:

Plaintiffs: ROGER S. BRAUGH, JR., ESQ.
Sico White, et al.
802 N. Carancahua St., Suite 900
Corpus Christi, TX 78401

Defendant: MICHAEL J. MUSKAT, ESQ.
ALISON MAY, ESQ.
Muskay Martinez & Mahony
440 Louisiana St., Suite 590
Houston, TX 77002

1 Corpus Christi, Texas; Friday, April 13, 2012; 2:31 p.m.

2 (Call to Order)

3 **THE COURT:** . . . *Lopez, et al. versus Allis-*
4 *Chalmers.*

5 **MR. BRAUGH:** Roger Braugh and Cliff Alexander for the
6 plaintiffs, your Honor.

7 **MR. MUSKAT:** Mike Muskat and Alison May for the
8 defendants, your Honor.

9 **THE COURT:** There are several motions pending before
10 the Court. I think I'm going to consider the defendant's
11 motions first, and then we can consider the plaintiffs'.

12 So, I was going to first take up the defendant's
13 motion for reconsideration of the order denying the protective
14 order; and if there is anything new, I don't mind considering
15 that, but if it's something I've already looked at, you know,
16 before I made the decision on that protective order, you know,
17 I'd rather not rehash that.

18 **MR. MUSKAT:** Understood, your Honor.

19 **THE COURT:** Okay. So, if there is anything new, you
20 can proceed.

21 **MR. MUSKAT:** Okay. And, your Honor, do you also want
22 me to address at this time our motion to refer settlement and
23 pretrial matters to the magistrate judge?

24 **THE COURT:** We'll do that after this motion to
25 reconsider the protective order.

1 **MR. MUSKAT:** Okay.

2 Your Honor, what I'd like to do, to give you some
3 additional context and to explain the new facts that we raised
4 in our motion for reconsideration, is to explain in more detail
5 than is set out in our papers the situation my client is in in
6 this case. These are, relatively speaking, your Honor, low-
7 dollar-value claims relative to the cost of litigation and the
8 burdens upon my clients in contesting the claims and litigating
9 them.

10 These are primarily field personnel. They make
11 between about 15 and 20 dollars an hour. The vast majority of
12 them were employed for -- in this capacity, in a contractor
13 capacity, for a period of a few months. They didn't always
14 work overtime in those weeks. And just very roughly
15 speaking -- this is not evidence -- but very roughly speaking,
16 these claims are a few thousand dollars per plaintiff, and
17 sometimes less than that.

18 The opt-in period of the class that you certified,
19 your Honor -- you certified a class in February of three job
20 titles in the Tubular Services entity, and there were 150
21 putative class members in that class. The opt-in period ends
22 early next week, your Honor, and there are between about 45 and
23 50 people who have opted in so far. So, I think, you know,
24 we'll wind up somewhere around a -- probably a number of about
25 50 opt-in plaintiffs asserting claims that range from probably

1 several hundred dollars to a few thousand dollars.

2 In light of that, your Honor -- and my clients saw
3 this situation for what it was back in February, when
4 Mr. Braugh indicated that -- you may recall we had a dispute
5 about the scope of the class, and plaintiffs' counsel indicated
6 that they wanted to do additional discovery to attempt to
7 expand the class. What my client decided at that time is that,
8 for business reasons, it is -- given the size of these claims,
9 given the number of likely opt-in class members, it did not
10 make business sense, your Honor, to continue to litigate issues
11 about the merits of the case. And, as a result, what my client
12 did in late February was to extend an offer of complete relief
13 under the Fair Labor Standards Act.

14 **THE COURT:** Okay. Got all that the first time
15 around. What is new? After I denied your motion for
16 protective order, what's new to form the basis of the motion
17 for reconsideration? I fully considered what you filed when
18 you filed your motion for protective order. I've considered
19 everything you've said right now, from what I recall.

20 So, I am just asking: Is there anything new I should
21 be looking at to decide whether I should reconsider that?

22 **MR. MUSKAT:** Well, there's new facts -- there's --
23 the motion for protective order, as you will recall, your
24 Honor, dealt with sort of two issues, or at least two types of
25 discovery, that the other side is seeking. One was related to

1 the merits of the case, and that's sort of what my comments
2 were directed to just then. The other sort of set of discovery
3 that's being sought relates to attempting to expand this class
4 beyond the entity with which the named plaintiffs contract, or
5 the Tubular Services entity.

6 And we were concerned, your Honor, that in the
7 response that was filed to our motion for protective order
8 there were distortions of the record designed to create the
9 impression that there is evidence out there that would support
10 a joint employment relationship. And we wanted to correct
11 those issues, and we did that in our motion for
12 reconsideration.

13 Our position on that, your Honor, and on this sought-
14 after discovery, is that these folks contracted with Tubular
15 Services only. They performed no services and signed no
16 contract with any other operating subsidiary within this group
17 of companies. And plaintiffs are right that the ultimate
18 parent company is called Allis-Chalmers Energy, Inc., and that
19 Allis-Chalmers and Allis-Chalmers Energy appear throughout this
20 chain of companies. But the issue is that these plaintiffs,
21 having not performed services and not contracted with any other
22 operating subsidiary, have no basis to seek to certify a class
23 that is any larger than what we have offered, your Honor, which
24 is everyone in Tubular Services. And, so, that was the other
25 basis for our motion, your Honor.

1 **THE COURT:** Court's going to deny the motion for
2 reconsideration of the order denying the protective order.

3 So, if you want to move on to the motion for referral
4 to magistrate judge?

5 **MR. MUSKAT:** Okay. I will, your Honor. And there is
6 some overlap here. It involves some of the same concerns.

7 We have -- by our offer of complete relief, your
8 Honor, we've essentially mooted any dispute that exists about
9 the merits of the plaintiffs' claims, about whether these
10 people were misclassified as contractors. And because of that,
11 we feel it's in the best -- certainly the best interest of my
12 clients, but also in the best interest of the class members, to
13 proceed to get these claims resolved, in the settlement
14 process, where we're not litigating the essentially moot issue
15 of whether these people were misclassified; what we're doing is
16 trying to determine the amount of back pay that's owed to each
17 putative class member or each opt-in class member.

18 And, so, what we have asked the other side to do, and
19 they have refused, is to engage in these discussions and see if
20 we can reach a settlement agreement without the necessity of
21 litigating issues that are essentially moot. And what we would
22 like to do is have a magistrate judge assist the parties in
23 that process by doing things such as being able to schedule
24 settlement conferences, mediate settlement terms, and help the
25 parties in this process of determining the back pay owed to

1 these folks so that we can get it paid and get this case
2 resolved and not spend a bunch of time and money litigating
3 moot issues.

4 And it seemed to us that a referral to a magistrate
5 judge was particularly appropriate because we do anticipate
6 your Honor would be understandably somewhat reluctant to get,
7 you know, get heavily involved in sort of settlement issues,
8 and so it seemed to us to be appropriate that this would be a
9 very good use of a magistrate judge, who can do those things
10 and can also address the discovery issues.

11 For example, we're going to have to determine the
12 back pay owed to each class member. You know, we will produce
13 time and pay records. Our hope is that we will be able to
14 agree with the other side on the back pay owed to a particular
15 opt-in class member, but if we can't do that, and if there is a
16 dispute about that, there may need to be some discovery about
17 that. And that it something that a magistrate judge, I think,
18 could help with in the context of working with the parties
19 through the settlement process.

20 Again, the goal here, your Honor -- the goal is to
21 get this wrapped up so that the class members are getting paid,
22 which we think in a timely way, which we think is in their best
23 interest. Because if this doesn't happen, if we are -- if we
24 are forced to continue to litigate a case where we have mooted
25 the liability issue, that's not in the best interest of the

1 class members.

2 **THE COURT:** But --

3 **MR. MUSKAT:** What it means is --

4 **THE COURT:** -- isn't that what they're here for, to
5 represent those class members and decide what's in their best
6 interest or not?

7 **MR. MUSKAT:** Well, I -- yes. That is what they're
8 charged with, your Honor. But here is the thing; is that the
9 deal can't get any better for these folks. Literally. It
10 can't. We've offered them everything that they are -- that
11 they would possibly be entitled to under the statute. And
12 because the deal can't get any better, continued litigation
13 just has a lot of risks to it.

14 It means that we're -- that we may get into dispute
15 about discovery issues, about the reasonableness of attorneys'
16 fees; my client may decide that, hey, if we have to go through
17 this process and litigate this thing after all, well, then,
18 let's take our chances, because -- because we can't do any
19 better than what we're offering now. And -- or rather, the
20 plaintiffs can't get any more than what we're offering now.
21 And, so, there's potential issues for appeal that are created;
22 all of which increase cost, increase expense, jeopardize a
23 potential resolution for the class members that is literally
24 ideal for them. And, so, as a result, it seems to us to be
25 prudent to proceed through this settlement process and utilize

1 a magistrate judge to help us with that process.

2 **THE COURT:** Okay. Thank you.

3 **MR. MUSKAT:** And that's the basis for the motion,
4 your Honor.

5 **THE COURT:** Mr. Braugh?

6 **MR. BRAUGH:** May I approach the podium, your Honor?

7 **THE COURT:** Yes.

8 **MR. BRAUGH:** Let me briefly address what I perceive
9 to be the same contention that was made in the motion for
10 protective order, which is: We have offered to settle;
11 therefore, you can't look any further into our business
12 practices. That seems to kind of be the backbone of the entire
13 argument.

14 When we were before you last time, as the Court
15 knows, the plaintiffs contended that the scope of the class
16 should have been larger. And I think we were standing at this
17 podium side by side when defense counsel for Allis-Chalmers
18 advised the Court that, although he had initially told you that
19 the proper scope of the class would be casing floor hands,
20 stabbers, and tong operators, they said: Well, we've been
21 looking some and there might be eight or nine more categories
22 that should be included. And I made the argument at that point
23 in time that these other categories of employees were literally
24 standing beside one another on the rig floor, and I said, you
25 know, that's -- it's fundamental, you know, in the oilfield,

1 these guys who are working the same jobs are laborers, and I
2 asked for counsel to stipulate to that, and he refused to.

3 And what transpired after that, I think the Court has
4 seen it in motion practice, but principally what is going on
5 now is the same thing that went on at the last hearing. And
6 that is an attempt to contain this case to a limited number of
7 enumerated employees in the South Texas Division, which was
8 represented by Archer Tubular Services, LLC. We see, now
9 having done more research and talked to employees, talking to
10 employees who have called us, that there are more employees out
11 there who were not paid overtime properly by these entities.

12 We find them in the state of Pennsylvania, another
13 case pending, where Allis-Chalmers Energy, Inc. stipulates that
14 it is the employer of coral tubing operators who are day-rate-
15 type employees; when compared to the affidavit that has been
16 filed in your court saying Allis-Chalmers Energy, Inc. is
17 merely a holding company that's never employed anybody. We get
18 payroll records from our own guys, our own people who are
19 coming to us, that show Allis-Chalmers Energy, Inc. on their
20 pay stubs. We find that the trucks they are driving are
21 apparently titled in the name of Allis-Chalmers Energy, Inc.
22 according to the, at least the affidavit we have received.

23 And, so, there is, in our mind, a substantial
24 question that remains about the proper scope of this class. We
25 believe, clearly, that since counsel for Allis-Chalmers

1 identified at the last hearing another, you know, I believe
2 it's eight categories of employees that should have been
3 included -- one, two, three -- I'm sorry; 12 categories of
4 additional employees that should be included -- that that's
5 something we should have had a stipulation on and the class
6 should have been expanded at that point in time.

7 Now another two months have burned off the clock. We
8 have sent discovery trying to get to the bottom of the
9 appropriate scope of this class, who the employer really is,
10 whether this is a single enterprise, and whether under the FLSA
11 Allis-Chalmers Energy, Inc. may be deemed to be an employer,
12 and, if so, it stands to reason that there are a lot more
13 employees out there that we don't know about.

14 So, we perceive the request on this particular motion
15 to appoint a magistrate to oversee mandated settlement
16 conferences on terms dictated by a defendant who continues to
17 hide the identity of employees to be nothing more than a
18 thinly-veiled disguise saying they don't like this Court's
19 rulings so far and they hope to do better with a magistrate.
20 We don't believe it would be appropriate to force settlement
21 discussions on an important case involving a substantial
22 federal right under the FLSA without allowing us to conduct
23 discovery and prove whether or not these defendants are being
24 honest in their representations and have identified all
25 relevant class members. We know for a fact they did not before

1 the first hearing, and we know for a fact that their settlement
2 offer is contingent and was expressly contingent upon the
3 plaintiffs' counsel agreeing that these would be the only
4 categories of employees, the ones they have identified to us,
5 not the ones we can do discovery on. We have to accept the
6 categories they have given us. That was a condition of the
7 settlement offer.

8 And, so, we don't believe appointing a magistrate to
9 oversee our case in this point in time is appropriate. We
10 don't believe that mandatory, forced settlement without
11 discovery is appropriate. And, so, we would ask to deny the
12 motion to appoint a magistrate to oversee this matter.

13 **THE COURT:** All right.

14 **MR. MUSKAT:** If I can respond, your Honor.

15 **THE COURT:** Yes.

16 **MR. MUSKAT:** I need to make something very, very
17 clear to the Court.

18 After the scheduling conference in February, we
19 offered -- this is in late February -- we offered to expand the
20 class to every contractor in Tubular Services. That needs to
21 be crystal clear. That was offered in February. We sent a
22 list of those people; it's 72 people. We sent a proposed order
23 and stipulation. And that grouping, the Tubular Services
24 grouping, is what we have offered complete relief to. There is
25 no basis on which to delay the settlement of those claims.

1 Now, it's a separate issue as to whether or not it's
2 appropriate to do discovery as to any other entity. That's a
3 separate issue. We can settle Tubular Services' claims. The
4 class now encompasses all of them. There's 222 people. And
5 part of the reason why we offered the additional 72 people is
6 precisely so that we would avoid disputes about whether and
7 which job titles should be included and whether everybody in
8 Tubular Services, you know, was properly included.

9 So, we did that in February. You know, we wanted to
10 settle those claims then. It's not true that -- you know, it's
11 not true that somehow we haven't done that or we delayed or
12 dropped the ball in doing that. It's just the other side has
13 refused to engage us in that. And it seems to us that we can
14 settle those claims and deal with this other issue as to
15 whether or not they ought to be able to do discovery and try to
16 certify other classes.

17 You know, plaintiffs' counsel mentioned this case in
18 Pennsylvania. And that's -- I'm glad he did, because the case
19 in Pennsylvania involves another operating company in this
20 group of companies, the Underbalanced Services. The plaintiffs
21 in that case -- the only plaintiffs in that case -- are
22 plaintiffs who worked for Underbalanced Services, that
23 particular operating company.

24 And if plaintiffs' counsel thinks that there are
25 unlawful practices that have occurred in other operating

1 subsidiaries within this group of companies, then they need to
2 have a plaintiff who works for those companies and can bring a
3 lawsuit challenging that practice.

4 But what I hear plaintiffs' counsel essentially
5 suggesting is, is that, well, because they've identified these
6 folks in South Texas who worked for Tubular Services, who they
7 believe were misclassified, we now essentially get to do an
8 audit of the entire group of companies to see if there are any
9 other unlawful practices that occurred anywhere else, even
10 though none of the plaintiffs work for those other entities and
11 there's no allegations at all to support that fact. You know,
12 if there is another operating subsidiary that has some unlawful
13 practice, all he has to have is a plaintiff who worked for that
14 subsidiary.

15 So, I just wanted that to be totally clear, and that
16 these are distinct issues. The issue of settlement of the
17 Tubular Services employees, which there is no reason not to get
18 that done as soon as possible --

19 **THE COURT:** Okay. Well, he is saying that there are
20 some conditions on that settlement that are a problem.

21 **MR. MUSKAT:** There are no conditions on settling the
22 claims of the Tubular Services class that we've proposed, which
23 is now a grand total of 222 people. As to those 222 people, as
24 to the people who opt in, we are willing to pay them all back
25 pay they are owed for a period of three years, double it for

1 liquidated damages, and pay attorneys' fees. And all we need
2 to do is determine what those numbers are, and we can get this
3 resolved.

4 **THE COURT:** Okay.

5 **MR. BRAUGH:** The settlement offer I received was, in
6 fact, conditional upon us accepting that as the scope of the
7 class. Not only that, they are still contending that we don't
8 get to do discovery to see if they are telling the truth about
9 the identity of those people. And, most importantly, your
10 Honor, they don't want us to discover whether or not the parent
11 company, Allis-Chalmers Energy, Inc., is, in fact, the employer
12 under the FLSA. They won't let us do discovery regarding that.
13 So --

14 **THE COURT:** I'm going to deny the motion to refer to
15 the magistrate judge.

16 **MR. BRAUGH:** So, the next motion --

17 **THE COURT:** I think there is some discovery that
18 needs to probably proceed.

19 So, next, the plaintiffs' motion for leave to file a
20 second amended complaint.

21 **MR. BRAUGH:** Yes, your Honor.

22 We filed a motion for leave to amend our complaint
23 and to file a second amended complaint. In that, your Honor,
24 you will note that we have altered the class definition. We
25 have pled some very specific facts that we received in

1 affidavits from new opt-in plaintiffs, one of whom is not part
2 of the currently existing certified class; Mr. Leyva was not
3 included in the original list of 151 people supplied by Allis-
4 Chalmers.

5 We have discovered -- not through discovery at this
6 time, because we don't have answers yet -- but we have
7 discovered through our research and investigation additional
8 probable violations of the FLSA, including not getting paid for
9 all hours worked, potential overtime violations because of the
10 off-the-clock hours that haven't been counted, and others as we
11 have described in our second amended complaint.

12 The response that we received from defense counsel
13 with respect to -- and, in particular, the state law claims
14 that we have attempted to bring, claims pertaining to federal
15 taxation issues, quite honestly, your Honor, we haven't done
16 the research to adequately respond, and it may very well be
17 that defense counsel is right about those matters.

18 And, so, what we would like to do is -- and we have
19 already prepared it -- is amend our proposed second amended
20 complaint to solely reference the FLSA claims and to remove all
21 records as to state law or federal taxation claims, and so we
22 should be able to resolve that particular objection that the
23 defendants had by agreement.

24 So, the only question, then, remaining on our motion
25 for leave to file the second amended complaint is whether we

1 should be able to plead this expanded class scope and the
2 specific facts that we have been able to uncover to date in the
3 additional provisions of violations of the FLSA. And we would
4 ask the Court's permission to do so. We believe that
5 permission for leave to file a second amended complaint in the
6 early stages of discovery is something that should be routinely
7 granted in the interest of justice and that there is no
8 practical or good reason not to allow the amendment now that we
9 have agreed to remove the state law and other unrelated claims.

10 **THE COURT:** All right.

11 Mr. Muskat?

12 **MR. MUSKAT:** Your Honor, I was just informed about
13 this amendment right before the hearing and handed a copy of
14 this, so I haven't had a chance to look through it and read it.

15 **THE COURT:** I am assuming they just deleted the state
16 law claims, what were claimed to be preempted, and everything
17 else stayed the same.

18 **MR. BRAUGH:** And the federal taxation issues as well,
19 your Honor.

20 **MR. MUSKAT:** So, our position, if that's what's -- if
21 that's what's occurred, our position on this is that we're not
22 opposed to the amended -- although I want to -- I want to make
23 clear that we're certainly not in agreement that the proposed
24 expanded class is appropriate that's the subject of their
25 motion to expand. We have substantial arguments in response to

1 that that we'd like to present.

2 So -- so, we don't -- we will withdraw our opposition
3 to the second amended complaint, but just want the record to be
4 clear that we would like our opportunity to contest the
5 expanded class.

6 **THE COURT:** Okay. And you're certainly entitled to
7 do that.

8 **MR. MUSKAT:** Thank you, your Honor.

9 **THE COURT:** Then, the Court's going to grant the
10 plaintiff's motion for leave to file the second amended
11 complaint as changed or as modified --

12 **MR. BRAUGH:** We will do so, your Honor.

13 **THE COURT:** -- as stated. Okay.

14 So -- but then we have the plaintiffs' motion to
15 modify the class and extend the opt-in date, correct?

16 **MR. BRAUGH:** Yes, your Honor.

17 May I proceed?

18 **THE COURT:** Yes.

19 **MR. BRAUGH:** I guess first there are a lot of parts
20 to this motion and it's hard to figure out where to start
21 first. But I think logically let me start with our existing
22 class that we have.

23 A few issues that we have had so far, we have some
24 bad addresses and we're having difficulty getting proper notice
25 out to a handful of the original employees who were identified

1 by Allis-Chalmers. We have had a chance to actually get hired
2 by a number of new Plaintiffs who have come in and talked to us
3 who we have been able to interview.

4 And we understand that there is likely a substantial
5 language barrier for a significant portion of this class such
6 that sending out the notices to them in English, as was
7 permitted by the original order authorizing notice to be sent
8 out, it likely didn't reach some of the class members in a way
9 that was effective in a way that they could understand.

10 And so we think that setting aside expanding the
11 class, the opt-in period certainly needs to be extended. And
12 we, of course, would like permission to translate the Court's
13 orders and notices and re-submit those to class members in
14 Spanish hoping to reach some people who may have -- not have a
15 full grasp of the English language who might be proper class
16 members. So I'll kind of treat that as a separate issue.

17 The overall issue, your Honor, is as Allis-Chalmers
18 has conceded now in open court, there are additional class
19 members that certainly should be added. The original class was
20 limited to the stabbers, casing floor hands and tong operators.
21 And so that was the limit of the first notice. Although we
22 have received a list with 72 additional potential class members
23 on it, we did not and still to this day do not have the Court's
24 permission to send out notice to them. And if we sent the
25 notice out to them, it would say this is to all former casing

1 hands, stabbers and tong operators. And they would say: Well,
2 I'm not one of those.

3 And so, you know, I think, in essence, there should
4 be a stipulation to expand the class to these remaining
5 72 people. So that's kind of the second layer is that I think
6 certainly we have to expand the class based on upon Allis-
7 Chalmers now agreeing there were more people who should have
8 been given notice and we don't have authority to give notice to
9 yet.

10 I think the more contested issue is this notion of
11 sending it out and sending this notice out not to just the
12 enumerated job titles, which Allis-Chalmers has been willing to
13 say are proper class members who at least they're not going to
14 contest it. As we stated in our initial briefing and we
15 maintain, we think the case law supports it's not the job
16 titles that matters. The classification as a worker, what that
17 particular title might be, is not the standard for
18 certification. It is the way these gentlemen, these workers,
19 ladies and gentlemen, were treated, the fact that they were
20 treated in violation of the FLSA.

21 And we have a substantial amount of documentary
22 evidence. Even though we don't have full discovery or any
23 discovery, we already have pay stubs that say Allis-Chalmers
24 Energy, Inc. is their employer. And we think that the class
25 ought to be expanded to anybody who worked for Allis-Chalmers

1 Energy, Inc. or Archer Tubular Services.

2 And, in particular, it should include people as we
3 have asked for in our notice that were either day-rate
4 employees, didn't get paid for all hours worked, had minimum
5 wage violations or weren't paid time-and-a-half for all hours
6 over 40. And I don't think there's a need for me to read into
7 the record word for word the description, but if you look at
8 our motion on Page 8, there's an all caps bold section; and
9 that would be the scope of the description we would ask.

10 There are a few other portions of this motion which
11 we think are important. One is the request that we be able to
12 post these notices in both Spanish and English at the work
13 places. And secondly, that this notice be posted not only in
14 Archer Tubular Services' premises but also in all Allis-
15 Chalmers' Tubular Services field offices where employees may
16 happen to see them.

17 And I think those are probably the highlights of the
18 motion, your Honor. We certainly need extra time. We've got
19 to get notice out to another 72 people. We know we didn't get
20 good notice out to all 151 the first time around, and so we're
21 asking for some time this summer to work all that out.

22 **THE COURT:** All right.

23 **MR. MUSKAT:** Your Honor, their motion raises
24 substantial and very serious issues from our perspective. You
25 know, we had planned to file a written response that set out

1 our factual and legal arguments in detail. I believe the
2 response deadline would have been the 25th. Frankly, your
3 Honor, we still have that opportunity. There's a lot to
4 address in the motion and in the proposed notice and in the
5 mechanics that Mr. Braugh has described that they are
6 proposing. Of course, you've asked us here to hear this anyway
7 and so I'm happy to summarize what our responses are, and I'll
8 go ahead and do that.

9 So we're agreeable to one proposed aspect of the
10 proposed expansion, and that is as to the 72 names. This was
11 the proposal that we made back in February to expand the class
12 to these additional 72 names, which would cover everybody who
13 was a contractor in Tubular Services. And we are -- well, I'll
14 address sort of the notice and mechanics and opt-in stuff down
15 the road.

16 But just in terms of class scope or expanded class
17 scope, we have no objection to expanding the class and sending
18 out notice to these additional 72 people.

19 Now, the proposed expanded class includes in addition
20 to -- well, it names not only the Tubular Services entity,
21 which we've been discussing, but also Allis-Chalmers Energy,
22 Inc. that this is supposed to go to current and former
23 employees who were classified as contractors or day-rate
24 employees by Allis-Chalmers Energy, Inc. and these other
25 entities. And I just -- I need to state for the Court that

1 it's our position that that doesn't include anybody else but
2 the 222 people; that Allis-Chalmers Energy, Inc. is a holding
3 company; it is does not employ anyone; it is the parent company
4 over a big group of companies.

5 **THE COURT:** Isn't that what they're wanting to do
6 some discovery on?

7 **MR. MUSKAT:** Well, that is. And so it's premature to
8 be leaping to the conclusion that their discovery is going to
9 show that it's appropriate to expand the class. If they're --
10 if it is ultimately determined that the class -- through
11 discovery that the class should be expanded beyond Tubular
12 Services, then it might be appropriate at that time to expand
13 the class. But we haven't gotten there yet. It's our
14 contention that this doesn't add anybody. This is just saying
15 Allis-Chalmers Energy, Inc. doesn't add anyone. I wouldn't
16 know who to add, because it's our position that that entity
17 doesn't employ anybody.

18 The workers in this big group of companies are
19 employed by the different operating companies. And it is
20 certainly, we contend, not appropriate to certify a class as to
21 workers in these other operating companies when the Plaintiffs
22 didn't work for them and there's been no demonstration that
23 this is all some integrated enterprise and there's been no
24 factual allegations of any unlawful pay practices in those
25 other entities. And so we would -- that's how we interpret

1 this. And to the extent it's to be interpreted any
2 differently, we would object.

3 We would further object to adding day-rate employees
4 to this group, because one of the named Plaintiffs are day-rate
5 employees. They were contractors who alleged to have been
6 misclassified. None of them were paid or alleged to have been
7 paid on a day-rate basis. There's been no showing at all of
8 any common policy or practice where any of the named Plaintiffs
9 have any standing whatsoever to bring claims on behalf of day-
10 rate employees. So we would object to an inclusion of day-rate
11 employees in the class.

12 We would further object to the aspect of this class
13 definition. Really, it's the last five lines of the class
14 definition, which talks about how these are folks who were not
15 paid overtime compensation for time worked in excess of
16 40 hours per work week and/or who were not paid for all hours
17 worked and/or who were not paid at the federal minimum wage of
18 \$7.25 for all hours worked. That assumes the conclusions that
19 the Plaintiffs are trying to prove, and we think it's not
20 appropriate to be in the class definition. What we should be
21 doing is objectively identifying the people who should receive
22 this according to their companies or their job titles as
23 opposed to including leaping to the conclusion that these are
24 valid claims.

25 For example, if somebody worked off the clock that

1 can be a violation of the overtime aspects of the FLSA if that
2 off-the-clock work was in excess of 40 hours per week. That
3 can also be a violation of, in theory, of the minimum wage
4 aspects of the FLSA if the off-the-clock work essentially
5 forced the regular rate below the minimum wage. But if neither
6 of those two things happens, the FLSA doesn't provide a remedy
7 for off-the-clock work.

8 And so, you know, we contest sort of the legal merits
9 of the notion that somebody who wasn't paid for all hours
10 worked if that didn't affect minimum wage or if that didn't
11 affect overtime, you know, that they would even have a valid
12 claim there. So we object to that aspect of the definition.

13 **THE COURT:** But the claim is different than just
14 getting notice out and then we'll figure out who may have a
15 claim or not.

16 **MR. MUSKAT:** Correct, your Honor. But my point is
17 just simply that, you know, in addressing this to people it
18 just doesn't seem fair to us to address it to them and
19 basically say, you know, you're getting this because you were a
20 victim of this unlawful practice.

21 **THE COURT:** No, if you were then you can --

22 **MR. MUSKAT:** Yes. Okay. So those are our issues
23 with the class scope. Yes. And so let me address sort of some
24 of the other mechanics, the opt-in period.

25 So we're okay with expanding this class to the

1 additional 72 people within Tubular Services. We don't agree
2 that it's appropriate to extend the opt-in period for those --
3 or to have an opt-in period for this all the way into August.
4 I think the first time around when you certified the first
5 class you gave a roundabout 60 days or so for an opt-in period.
6 And it seems to us that that's the appropriate opt-in period
7 for these folks is about 60 days or so.

8 We object to the notion of extending the opt-in
9 period for the people who've already received notice. I mean
10 these people have now had almost 60 days to opt in.
11 Plaintiffs' counsel did not ask for a notice in Spanish to be
12 sent out originally. It appears as if they've had substantial
13 contact with these people, with the class members. There's
14 been a lot of communications about this case. We have a large
15 number of people that opted in. So we don't think it's fair to
16 extend the opt-in period even further. Sixty days were picked
17 originally for a reason because that's what courts typically
18 say is an appropriate amount of time. And so, you know, we
19 don't think that there's any basis to extend it even further
20 for the people who have already the notice.

21 We don't object for the notice that goes out to these
22 additional 72 folks, we don't object to that being in Spanish
23 although we would like, you know, to see a copy of that. I
24 mean we would like to have an opportunity to assure that it is
25 accurate. But we don't have an objection to principle to that.

1 In terms of -- we have no objection just like you did
2 the first time around to posting the notice on company bulletin
3 boards. But what I'm not clear about is if we are suggest-- if
4 Plaintiffs' counsel is suggesting posting this notice on the
5 bulletin boards of other operating companies within this group
6 of companies, like in Pennsylvania or wherever, that doesn't
7 seem to us to be appropriate. We don't think that those people
8 ought to be included in the class, and we don't think that
9 there are any Tubular Services' employees who would benefit
10 from that. I mean we would already -- we've already done what
11 we would agree to do here, is to have the notice posted in the
12 Tubular Services' offices.

13 Your Honor, I have read the proposed notice. I have
14 not gone -- I mean I was going to before the 25th, but I have
15 not gone through it in detail sort of with an eye toward
16 redlining it to see if there's any sort of misleading or
17 prejudicial or non-mutual statements in here. I'd like the
18 opportunity to do that if, you know, to make sure that we're
19 okay with the language in the notice. Kind of like we did the
20 first time around when the Plaintiffs filed a proposed notice
21 and we redlined it and then the Court made its decision and
22 issued something somewhere in between. So we have not done
23 that. We would like to do that. That's it.

24 **MR. BRAUGH:** If I may, your Honor?

25 **THE COURT:** Yeah.

1 **MR. BRAUGH:** With respect to the scope of the notice,
2 you will note in our brief that we had discussed the concept of
3 enterprise as it is understood under the FLSA, which really
4 forms the basis for what an employer is.

5 I don't hear arguments from Allis-Chalmers in terms
6 of the FLSA's definition of who employer is. They keep on
7 saying well one is -- this is an operating subsidiary, so
8 clearly you can't send out a notice to an operating subsidiary.
9 But that's not what the FLSA says. The FLSA says that this
10 enterprise is the employer. And that may include related
11 companies by the claim definition of this.

12 It is clear to me from the arguments being made so
13 far by Allis-Chalmers, and it's a good tactic, that they want
14 to compartmentalize their business and make us find an employee
15 for every one of their 27 subsidiaries before they actually
16 have to pay up under the FLSA for the employees they have been
17 underpaying for many years now.

18 A few months has burned off the clock of 71 or 72
19 employees that Allis-Chalmers knew at the last hearing should
20 have been part of this class and should have received notice.
21 And so we believe that there is a concerted effort to delay the
22 identification of employees so that they will lose their
23 statute of limitations. And by the time we finally slog
24 through discovery and find them their clock will be burned up
25 and the case will be as Mr. Muskat described early on this

1 case, of literal no value, small claims, it's really not worth
2 their time litigating because these are such small claims for
3 people that aren't going to get much money.

4 But I can assure the Court that to these people the
5 money they were due and are due today is very significant to
6 them. And that's especially true for people who we haven't
7 been able to identify yet because we can't get discovery.

8 And so I think under the current record that you have
9 before you, what you have is some evidence we have presented
10 suggesting that Allis-Chalmers Energy, Inc. is part of an
11 enterprise that is imposing this illegal pay scheme on all of
12 these employees, many of whom we don't know about.

13 We sent discovery to try to get at that, and it's
14 part of the motion to compel that was filed yesterday. And we
15 got zero answers. So as we sit here before you on the second
16 hearing regarding certification, the first hearing they
17 wouldn't -- they would identify and concede there may be other
18 people but wouldn't stipulate to them. Now we're saying all
19 those are all separate operating subsidiaries, you can't touch
20 us; and at the same breath and at the same time they are
21 refusing to answer discovery about it. So we will be back here
22 again further delayed, further time off the statute of
23 limitations if we don't go ahead and certify this class.

24 If Allis-Chalmers Energy, Inc. has told this Court
25 the truth they don't have a single employee, they're merely an

1 operating company, then guess how many people will be on the
2 list of affected employees? Zero.

3 If they are tested and they are put on this order, we
4 are going to find out very quickly if that's true. We may get
5 a list of a thousand employees or they may stick with it and
6 say, no, it's zero. If it's zero and what they're saying is
7 true, there is absolutely no harm in including them in this
8 class.

9 **THE COURT:** Okay.

10 **MR. MUSKAT:** Your Honor, the problem about -- let me
11 pick up his last point -- is it's not clear to us what they're
12 suggesting -- who they are suggesting be included in this
13 class. If they are suggesting that every single contractor
14 that was employed by any operating company within this group of
15 companies would be included within the scope, that's okay.
16 Well, then we have a substantial disagreement with them on
17 that. Because in order to get conditional certification of a
18 class, it's their burden to show a common policy or practice
19 that extended throughout that entire class. And they've had
20 three people who are named Plaintiffs step forward and provide
21 proof of a practice that occurred within the Tubular Services
22 entity. And what they would improperly be doing by
23 conditionally certifying a class in the absence of any evidence
24 or even allegation of class-wide unlawful practices is skirting
25 the entire conditional certification process, truly putting the

1 cart before the horse.

2 So if what they are suggesting is that that's who
3 should get the notice is everyone in every operating company
4 who is considered a contractor or a day-rate employee, we
5 thinks that's improper.

6 My point about Allis-Chalmers Energy, Inc. is just
7 that it is a holding company that doesn't employ anyone. Now,
8 they seem to be contesting that. They seem to be suggesting
9 that as a matter of integrated enterprise principles or joint
10 employment principles, what I think they're suggesting is that,
11 no, that's not true; Allis-Chalmers Energy, Inc. actually is
12 the employer of everybody in every operating company in this
13 entire group of companies.

14 And if that's what they're saying is true, then
15 that's -- you've ordered discovery on that and I guess we will
16 do discovery on that and litigate that. But it would put the
17 cart before the horse to send out notice to everybody on the
18 assumption that what they say is true about this enterprise.
19 And so that's -- just to be clear, that's our issue in terms of
20 the class scope.

21 I just have to correct for the record a couple of
22 these comments that opposing counsel is making about positions
23 we've taken. I think he just said that we -- you know, we
24 showed up at this scheduling conference in February knowing
25 that these 72 people should be included. And that's not the

1 case your Honor. We took the position that the class ought to
2 be limited to the South Texas District of Tubular Services and
3 these particular job titles.

4 My client made a business decision after that hearing
5 once it became clear that the other side intended to pursue
6 this further that it wasn't worth the litigation. So I want
7 the record to be clear about that. No one knew that these
8 additional -- and to this day the reason why we are willing to
9 include the 72 people is not because we think they are proper
10 class members but because we do not want to litigate that issue
11 any further. Thank you, your Honor.

12 **THE COURT:** Okay.

13 **MR. BRAUGH:** I don't even want to go back and forth
14 too much, your Honor, but --

15 **THE COURT:** It's your motion so you get the last
16 word.

17 **MR. BRAUGH:** But there clearly is evidence that we
18 have supplied in the record and attached to our motion -- and
19 refer to our motion -- that Allis-Chalmers Energy, Inc. is the
20 employer. What counsel for Allis-Chalmers is saying: Well,
21 that's okay, we'll agree to do discovery on that now, even
22 though they just refused to answer discovery this week. There
23 is evidence before the Court. The only conflict in the
24 evidence is they have supplied this Court with one affidavit
25 that says Chalmers is merely -- Energy, Inc. is merely a

1 holding company. We have supplied this Court with a
2 stipulation signed by them in federal court saying they do
3 employ people.

4 So the evidence before the Court supports expanding
5 the class to Allis-Chalmers Energy, Inc. If they are truly not
6 employers under the definition established by the FLSA for the
7 enterprise, then they won't be identifying any employees. They
8 can read the statute; they can comply or choose not to comply
9 with it. But I think it's time to test them.

10 **THE COURT:** Okay. I'm going to take that motion
11 under advisement and probably get a ruling out early next week,
12 okay?

13 **MR. BRAUGH:** Thank you, your Honor.

14 **THE COURT:** Now, I know you all just filed the motion
15 yesterday?

16 **MR. BRAUGH:** Yes, your Honor.

17 **THE COURT:** Regarding the discovery, motion to compel
18 discovery responses?

19 **MR. MUSKAT:** Yes. And as I told Plaintiffs' counsel
20 yesterday, the objection we made to discovery were consistent
21 with almost everything we've been discussing in this hearing.

22 **THE COURT:** Okay.

23 **MR. MUSKAT:** We were hoping that the Court would side
24 with us on those issues and, therefore, you know, essentially
25 sustain many of the objections we made. That hasn't happened,

1 and so we will re-evaluate our objections.

2 Now, we also -- I do want to make clear that not all
3 the objections we made were just mirror images of the more
4 global objections we made in this hearing. And we made certain
5 individualized objections to these requests; I mean as being
6 overbroad or burdensome or whatnot, you know. And the motion
7 that they filed just basically says -- I mean ignores that
8 level of detail and just basically says we'll respond to
9 everything.

10 But what I guess we would like to have the
11 opportunity to do is to now go back and given the rulings
12 you've made at this hearing, your Honor, have an opportunity to
13 answer subject to, you know, some or all of those objections.
14 But we need an opportunity to go back and review them.

15 **THE COURT:** Okay. How much time do you need?
16 Because I think that time had already lapsed for you to
17 respond, right? So they filed a motion to compel. How much
18 time do you need now based on the rulings of the Court to go
19 back and look at what you've answered and whether you're going
20 to change it or modify it or not?

21 **MR. MUSKAT:** Well, I mean we don't need much time to
22 make those decisions. What we need a little bit of time to do
23 is to produce documents that are responsive to the requests.

24 **THE COURT:** How much time are you talking about?

25 **MR. MUSKAT:** Two weeks.

1 **THE COURT:** I was going to say seven days, give you
2 seven days to get it answered. If not, they're going to bring
3 the motion to compel back to the Court, I'm assuming so --

4 **MR. MUSKAT:** Yes, and I -- yes. I guess if we
5 have -- you know, intractable, you know, disagreements about
6 certain of the objections I guess that is what would happen.
7 But we will make every effort, your Honor, as to the things
8 that where we're not standing on objections but we're going to
9 produce responsive documents, we will make every effort to do
10 that as quickly as possible.

11 **THE COURT:** Okay. So by Friday the 20th you'll file
12 responses?

13 **MR. MUSKAT:** Yes.

14 **THE COURT:** To the discovery and then --

15 **MR. MUSKAT:** Yes.

16 **THE COURT:** -- if there continue to be issues I guess
17 set a hearing with the Court?

18 **MR. BRAUGH:** We will.

19 **THE COURT:** You all need to fully confer before you
20 do that after they have filed -- if they stand on their
21 objections or not or wherever you may be, if you all will, you
22 know, confer about that before you bring it to the Court, I'd
23 appreciate that.

24 Is there anything else pending?

25 **MR. BRAUGH:** There's nothing else pending. I think

1 just for the record, you know, we know that there is a
2 mechanism for seeking equitable tolling limitations period for
3 class members. We would just remark for the record that based
4 upon what happened in the first hearing and what is transpiring
5 now with respect to discovery it is likely that we will need to
6 file that response or request that relief based upon the pace
7 at which discovery has been forthcoming.

8 **THE COURT:** Okay. Anything else?

9 **MR. BRAUGH:** No, your Honor.

10 **THE COURT:** Then you can be excused.

11 **(This proceeding was adjourned at 3:22 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written above a horizontal line.

Signed

April 17, 2012

Dated

TONI HUDSON, TRANSCRIBER